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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte STEVEN BARRITZ and
ROBERT BARRITZ

Appeal 2008-002633
Application 09/766,438
Technology Center 3600

Decided:[1] July 31, 2009

Before MURRIEL E. CRAWFORD, HUBERT C. LORIN, and
ANTON W. FETTING, *Administrative Patent Judges*.

LORIN, *Administrative Patent Judge*.

DECISION ON APPEAL

[1] The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

STATEMENT OF THE CASE

Steven Barritz, et al. (Appellants) seek our review under 35 U.S.C. § 134 of the final rejection of claims 1-4, 6, 8-20, and 22-42. Claims 5, 7, and 21 have been cancelled. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

SUMMARY OF DECISION

We AFFIRM.[2]

THE INVENTION

The invention relates to a broadcasting system "for creating incentives that promote the exchange of personal information by viewers and listeners for targeted advertising by the broadcasters." Specification 1.

All the claims are "system" claims, with claims 1 and 39 being the independent claims. Claim 1, reproduced below, is illustrative of the subject matter on appeal.

> 1. A public broadcasting system, the system comprising:
>
> a facility for collecting viewers' profile data that is used for controlling program and advertisement content delivery to customers;
>
> a facility for providing the viewer profile data to a program and advertising content controlling facility;

[2] Our decision will make reference to the Appellants' Appeal Brief ("Br.," filed Dec. 26, 2006) and the Examiner's Answer ("Answer," mailed Jul. 27, 2007).

a content selector that provides to viewers program content;

an advertising inserter which selects alternate advertising that is intended to selectively replace or supplement commonly provided advertising content, based on the viewer profile data;

a facility that sets rewards to viewers based on criteria that is associated with the viewer profile data provided by viewers; and

a control which responds to the rewards set by the rewards facility, in a manner which adjusts the durations of the program content and the durations of the advertising content being provided to the different ones of said viewers based on their corresponding viewer profile data.

THE REJECTIONS

The Examiner relies upon the following as evidence of unpatentability:

Wachob	US 5,155,591	Oct. 13, 1992
Logan	US 5,721,827	Feb. 24, 1998
Herz	US 6,088,722	Jul. 11, 2000

The following rejections are before us for review:

1. Claims 1-4, 6, 8, 10-14, 17-19, 22, 24-26, 28, 31, 32, 34, 36, 37, 39-41 are rejected under 35 U.S.C. §103(a) as being unpatentable over Wachob and Logan.
2. Claims 15, 16, 20, 27, 29, 30, 33, 35, 38, 40, and 42 are rejected under 35 U.S.C. §103(a) as being unpatentable over Wachob, Logan, and Herz.

ARGUMENTS

The Examiner's position is that Wachob discloses the following first four elements recited in claim 1:

- "a facility for collecting viewers' profile data that is used for controlling program advertisement content delivery to customers" and "a facility for providing the viewer profile data to a program and advertising content controlling facility." (*see* Ans. 4, relying on Wacob., col. 11, ll. 25-35); and,
- "a content selector that provides to viewers program content" (*see* Ans. 3, relying on *Id.*, col. 1, ll. 27-30);
- "an advertising inserter which selects alternate advertising that is intended to selectively replace or supplement commonly provided advertising content, based on the viewer profile data" (*see* Ans. 4, relying on *Id.*, col. 2, ll. 59-64 and col. 6, l. 46 to col. 7, l. 45).

The Examiner relies on Logan (*see* Ans. 4, relying on Logan, cols. 9-10 and 25-26) as evidence that the following last two elements recited in claim 1 are disclosed in the prior art:

- "a facility that sets rewards to viewers based on criteria that is associated with the viewer profile data provided by viewers," (Ans 15) and,
- "a control which responds to the rewards set by the rewards facility, in a manner which adjusts the durations of the program content and the durations of the advertising content being provided to the different ones of said viewers based on their corresponding viewer profile data:" Answer 5.

The Examiner argues that the claimed subject matter would have been obvious to one of ordinary skill in the art because one would arrive at the claimed invention by combining the elements separately disclosed in Wachob and Logan. Answer 5.

The Examiner takes the same position as to the subject matter of claim 39. *See* Ans. 3-5.

The Appellants disagee.

With respect to the rejection of claim 1, the Appellants argue that

1. Wachob does not disclose
    a. "any intent to provide or control the dissemination of targeted television commercials based on and "reward" criteria or mechanism" (Br. 3);
    b. "setting the 'durations of advertising content' in some relationship to the rewards that have been set" (Br. 4); and,
    c. "sets no 'rewards' and it cannot alter the duration of an advertisement to suit a level of rewards which have been set for a particular viewer or a group of them" (Br. 4).

2. Logan does not disclose
    a. a "tie-in with television advertising or intertwining a reward with the durations of television or broadcast commercials" (Br. 4); and,
    b. "adjusting the duration of television or broadcast commercials in relation to the content otherwise provided by the viewer" (Br. 4).

The Examiner responded to the Appellants' arguments over what Wachob does *not* disclose by indicating that Logan, not Wachob, was relied upon for showing the argued-over limitations. Answer 10.

Regarding the Logan arguments, the Examiner reiterated that Logan discloses elements setting rewards to viewers based on criteria that is associated with viewer profile data provided by viewers and responding to the reward in a manner which adjusts the durations of the program content and the durations of the advertising content being provided, relying principally on the Logan disclosures at col. 5, ll. 20-36; col. 6, l. 48-col. 7, l. 13; col. 9, ll. 5-11 and 39-44; col. 9, l. 65-col. 10, l. 5; col. 10, l. 63-col. 11, l. 2. Answer 10-11.

Regarding claim 39, the Appellants argue, in part, that neither Wachob nor Logan "teach or suggest any advertising player that is 'coupled with and located at a corresponding' receiving device." Brief 5. According to the Appellants, "claim 39 defines an advertising player that is 'located' at a receiving device, and includes a 'facility for receiving and pre-storing the advertising content'" (Br. 6) which the Appellants contend neither reference teaches or suggests. The Appellants further argue that Herz does not supply these elements missing from the combination of Wachob and Logan so as to

meet the limitations in the claims for "intertwining a reward with the duration of television or broadcast commercials" (Br. 6) and "adjusting the duration of television or broadcast commercials in relation to the content otherwise provided by the viewer." Brief 6.

The Examiner responded by directing attention to "Fig. 2, item 212 and associated text." Answer 16.

ISSUES

1. Does Logan disclose, as the Examiner asserts, the claim 1 limitations:
   - "a facility that sets rewards to viewers based on criteria that is associated with the viewer profile data provided by viewers"(Ans.14); and,
   - "a control which responds to the rewards set by the rewards facility, in a manner which adjusts the durations of the program content and the durations of the advertising content being provided to the different ones of said viewers based on their corresponding viewer profile data"? Answer 5.

2. Does Logan disclose "a respective advertising player coupled with and located at a corresponding one of the receiving devices" as claimed in claim 39? Brief 12.

FINDINGS OF FACT

We find that the following enumerated findings of fact (FF) are supported by at least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Office).

Claim construction

1. Claim 1 calls for "rewards." Brief 8.
2. The Specification does not provide a definition for "rewards".
3. The definition of "reward" is "something given in return for good or, sometimes, evil, or for service or merit." (*See* Webster's New World Dictionary 1150 (3rd Ed. 1988.)(Entry 1. for "reward.")
4. The Brief does not advocate for a particular definition for "rewards."

The scope and content of the prior art

5. Logan relates to a broadcast system for selectively delivering personalized information to subscribers. Col. 1, ll. 6-9.
6. Logan discloses a server subsystem that accepts subscriber indications of the subscriber's general interests and this subscriber's interest data is matched against stored program segments to identify segments of potential appeal to the subscriber. Col. 1, l. 66-col. 2, l. 9.
7. Col. 5, ll. 20-36 of Logan reads:

> The host server 101 periodically transmits a download compilation file 145 upon receiving a request from the player 103. The file 145 is placed in a predetermined FTP download file directory and assigned a filename known to the player 103. At a time determined by player 103 monitoring the time of day clock 106, a dial up connection is established via the service provider 121 and the Internet to the FTP server 125 and the download compilation 145 is transferred to the program data store 107 in the player 103. The compilation 145 is previously written to the

download directory by a download processing mechanism seen at 151 in the server 101. Download processing, as described in more detail later, extracts from the library 130 data defining compressed program, advertising, and glue segments. and/& associated text program data, based on selections and preferences made by (& inferred for) the user as specified & the subscriber data and usage log database 143.

8. Col. 6, l. 48-col. 7, l. 13 of Logan reads:

As indicated at 203. an interested subscriber invokes programming services by first supplying personal information and initial programming preferences during an account initialization procedure. Preferably. as explained in more detail later, account initialization is accomplished by presenting the subscriber with HTML forms to complete and submit to CGC script programs which execute on the server to post subscriber supplied information into an initial user dataset. Based on the information supplied by the user, the server then compiles one or more files for downloading to the subscriber at step 207 which include programming and advertising segments as well as additional data and utility programs needed by the player 103 to begin operation. The download operation preferably occurs at a time established by the player which establishes a dial up connection via the SLIP/PPP serial connection 117 to the

local Internet service provider 121 which provides an Internet connection to the host FT'P server 125. The download file or files containing programming and advertising segments as well as subscriber specific data are designate by filenames provided by the requesting client/player 103 and moved from storage unit 145 utilizing the FIT server 125 and the Internet connection into local storage at 107 in the client/player 103. The filenames used to specify the files in the server 125 may conveniently be formed from the program value used by both the host and the player to identify and differentiate the different program segments used. The data downloaded a program sequence file which provisionally identifies the order in which downloaded program segments are to be played, with the initial selection and sequence being established based on user preference data by the download compilation processing mechanism seen at 151 at the server.

9. Col. 9, ll. 5-11 of Logan reads:

…factors indicating the level of interest in each category. The subscriber may also indicate general preferences with respect to the including advertising, including an indication of the amount of advertising which is acceptable to defray subscription costs, ranging from fully advertised programming for minimum subscription charges to the complete exclusion of advertising

10. Col. 9, ll. 39-44 of Logan reads:

> Because personal data describing each subscriber's subject matter interests is available, along with personal data (age, marital status, zip code, etc.), particular advertising segments may be directed to only those subscribers having a likely interest in the goods or services advertised. This targeted advertising need not be presented at any time during…

11. Col. 9, l. 65-col. 10, l. 5 of Logan reads:

> …the service by accepting sufficient advertising content to reduce the subscription cost to an acceptable level. Subscribers may also set a player system variable to a value indicating the subscription costs per unit time that the subscriber is willing to accept, and the player 103 can then automatically insert advertising segments between program segments in sufficient quantity to achieve a net charge at the desired level.

12. Col. 10, l. 63-col. 11, l. 2 of Logan reads:

> Note however that. if the user elects to have advertising segments automatically inserted between program segments to achieve a predetermined cost level, that insertion occurs under the control of the playback mechanism at 235 such that advertising segments not identified in the selections file may be added or advertising segments specified in the selections file may be automatically skipped.

13. Wachob relates to the broadcasting of different commercial messages to different demographically targeted audiences.

14. Herz relates to scheduling broadcast of video programs.

Any differences between the claimed subject matter and the prior art

15. The references do not expressly disclose "a facility that sets rewards to viewers based on criteria that is associated with the viewer profile data provided by viewers" and "a control which responds to the rewards set by the rewards facility, in a manner which adjusts the durations of the program content and the durations of the advertising content being provided to the different ones of said viewers based on their corresponding viewer profile data". Answer 4. *See also* claim 1

The level of skill in the art

16. Neither the Examiner nor the Appellants have addressed the level of ordinary skill in the pertinent art of broadcasting. We will therefore consider the cited prior art as representative of the level of ordinary skill in the art. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001) ("[T]he absence of specific findings on the level of skill in the art does not give rise to reversible error 'where the prior art itself reflects an appropriate level and a need for testimony is not shown'") (*quoting Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163 (Fed. Cir. 1985)).

Secondary considerations

17. There is no evidence on record of secondary considerations of non-obviousness for our consideration.

PRINCIPLES OF LAW

Obviousness

> Section 103 forbids issuance of a patent when 'the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.'

KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 406 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, and (3) the level of skill in the art. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). *See also KSR*, 550 U.S. at 407 ("While the sequence of these questions might be reordered in any particular case, the [*Graham*] factors continue to define the inquiry that controls.") The Court in *Graham* further noted that evidence of secondary considerations "might be utilized to give light to the circumstances surrounding origin of the subject matter sought to be patented." 383 U.S. at 17-18.

ANALYSIS

The rejection of claims 1-4, 6, 8, 10-14, 17-19, 22, 24-26, 28, 31, 32, 34, 36, 37, 39-41 under 35 U.S.C. §103(a) as being unpatentable over Wachob and Logan.

Claim 1

The Appellants argued claims 1-4, 6, 8, 10-14, 17-19, 22, 24-26, 28, 31, 32, 34, 36, 37, 39-41 as a group (Br. 5). We select claim 1 as the representative claim for this group, and the remaining claims 2-4, 6, 8, 10-

14, 17-19, 22, 24-26, 28, 31, 32, 34, 36, 37, 39-41 stand or fall with claim 1. 37 C.F.R. § 41.37(c)(1)(vii) (2007).

We have carefully reviewed the Examiner's position and the Appellants' arguments challenging that position. We find that the Appellants' arguments are premised on a too-narrow construction of claim 1.

We agree that Logan does not disclose the claim term "rewards."

However, the ordinary and customary usage of the term "rewards" is "something given in return ... for service." FF 3. Giving claim 1 the broadest reasonable construction in light of the Specification (FF 2) as it would be interpreted by one of ordinary skill in the art, leads us to construe the claim limitations, "a facility that sets rewards to viewers based on criteria that is associated with the viewer profile data provided by viewers" (Claim 1) and "a control which responds to the rewards set by the rewards facility, in a manner which adjusts the durations of the program content and the durations of the advertising content being provided to the different ones of said viewers based on their corresponding viewer profile data" (*Id.)* as meaning, a facility that gives something in return to viewers based on criteria associated with profiles provided by the viewers and a control that responds to that something that is given in such a way as to adjust the durations of the program content and the advertising content being provided to the viewers based on their profiles.

Logan discloses a system whereby program content and advertising is provided to a subscriber based on the subscriber's preferences. FF 7-8. Accordingly, Logan discloses a facility providing program content and advertising content to viewers based on their profiles.

Furthermore, Logan's system provides subscribers with the ability to elect to have the advertisements inserted into the program content as a way to defray subscription costs. FF 9-12. Subscribers are permitted to elect any amount of advertising, from fully advertised to no advertisements. FF 9.

The ability of Logan's system to provide subscribers to have any amount of the advertisements (provided to the subscribers based on the subscriber's preferences) inserted into the program content (also provided to the subscribers based on the subscriber's preferences) to defray subscription costs has two effects. First, the duration of a broadcast is necessarily increased with increasing insertions of advertisements. Accordingly, in providing an ability to provide subscribers to have any amount of advertisements inserted in the program content of a broadcast, Logan's system necessarily provides a system for adjusting the durations of the program content and the durations of the advertising content within a broadcast. Second, allowing subscribers to defray subscription costs via the insertion of advertisements is "something given in return ... for service" (FF 3). We agree with the Examiner that subscribers are being "rewarded," as that term is ordinarily and customarily defined (FF 3), through a defraying of costs when they elect to have advertisements inserted in the program content of the broadcast. The combined effect is such that Logan's system comprises a facility that gives something in return (i.e., the defrayed costs) to viewers based on criteria associated with profiles provided by the viewers and a control (i.e., an election to insert advertisements) that responds to that something (i.e., the defrayed costs) that is given in such a way as to adjust the durations of the program content and the advertising content being provided to the viewers based on their profiles.

Accordingly, we find that when claim 1 is given the broadest reasonable construction in light of the Specification, the Examiner has established a prima facie case of obviousness for the claimed system comprising

- "a facility that sets rewards to viewers based on criteria that is associated with the viewer profile data provided by viewers"(App. Br. 8); and,
- "a control which responds to the rewards set by the rewards facility, in a manner which adjusts the durations of the program content and the durations of the advertising content being provided to the different ones of said viewers based on their corresponding viewer profile data, (*Id.)*"

in view of Logan.

Claim 39

The Appellants' arguments challenging the rejection of claim 39 (*see* Br. 5-6) are not, strictly speaking, in a form that follows the rules. Nevertheless we have reviewed them but do not find them persuasive as to error in the rejection.

The Appellants argue, in part, that neither Wachob nor Logan "teach or suggest any advertising player that is "coupled with and located at a corresponding" receiving device." Br. 5. However, it is clear that Logan discloses a player (such as a computer, *see* col. 3, l. 2) and it would be obvious to one of ordinary skill in the art to locate this device at any reasonable location vis-à-vis a corresponding receiving device. Furthermore, Logan describes the player as having a function that allows it to insert advertising segments between program segments and to an extent

that yields the desired defraying of cost. FF 11 and 12. Logan describes the player as having storage (col. 3, l. 6), which can store advertising content (col. 4, l. 41). Accordingly, we find unpersuasive the Appellants' argument that the references do not show a "facility for receiving and pre-storing the advertising content" Brief 6. *See also* Answer 4. As for the arguments relative the limitations in the claims for "intertwining a reward with the duration of television or broadcast commercials" (Br. 6) and "adjusting the duration of television or broadcast commercials in relation to the content otherwise provided by the viewer" (Br. 6), we have addressed them above with respect to the rejection of claim 1, finding them unpersuasive.

The Examiner has provided an apparent reasoning with logical underpinning for the legal conclusion of obviousness and thus met the initial burden of establishing a prima facie case of obviousness. We have reviewed the Appellants' arguments but do not find them persuasive as to error in the Examiner's prima facie case of obviousness. Accordingly, the Examiner's rejection of claims 1-4, 6, 8, 10-14, 17-19, 22, 24-26, 28, 31, 32, 34, 36, 37, 39-41 under 35 U.S.C. §103(a) as being unpatentable over Wachob and Logan is therefore affirmed.

The rejection of claims 15, 16, 20, 27, 29, 30, 33, 35, 38, 40, and 42 under 35 U.S.C. §103(a) as being unpatentable over Wachob, Logan, and Herz.

The Appellants' arguments are limited to discussing Herz. However, Herz is criticized for not teaching "intertwining a reward with the duration of television or broadcast commercials [and] adjusting the duration of television or broadcast commercials in relation to the content" (Br. 6). Since,

for the foregoing reasons, we agree with the Examiner that Logan discloses these features, it is unnecessary to address whether Herz does likewise.

There being no other arguments, we will affirm the rejection of claims 15, 16, 20, 27, 29, 30, 33, 35, 38, 40, and 42 under 35 U.S.C. §103(a) as being unpatentable over Wachob, Logan, and Herz

CONCLUSIONS

We conclude that the Appellants have not shown that the Examiner erred in rejecting claims 1-4, 6, 8, 10-14, 17-19, 22, 24-26, 28, 31, 32, 34, 36, 37, 39-41 under 35 U.S.C. §103(a) as being unpatentable over Wachob and Logan and claims 15, 16, 20, 27, 29, 30, 33, 35, 38, 40, and 42 under 35 U.S.C. §103(a) as being unpatentable over Wachob, Logan, and Herz.

DECISION

The decision of the Examiner to reject claims 1-4, 6, 8, 10-20, 22, 24-41 is affirmed.

AFFIRMED

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